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December 10, 1987

Mr. M. J. Hassell, Commissioner
Arizona State Land Department
1624 West Adams
Phoenix, Arizona 85007

Re: I87-157 (R87-116)

Dear Commissioner Hassell:

You have requested our opinion whether local jurisdictions, i.e. cities, towns and counties, have the authority to impose zoning classifications on state trust lands that are inconsistent with the State Land Commissioner's determination of the best use of the land. We conclude that the final determination as to the use of such lands rests with the Commissioner.

Upon Arizona's admission into the Union, the United States Congress granted Arizona approximately nine million acres of land in trust for the benefit of Arizona's common schools and certain other public institutions. Enabling Act, 36 U.S. Stat. 557, 568-597 ("Enabling Act"), §§ 24-30; Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); Berry v. Arizona State Land Department, 133 Ariz. 325, 651 P.2d 853 (1982). By the adoption of Ariz. Const., art. XX, Par. 12, the people of Arizona accepted the trust lands subject to the provisions of the Enabling Act. It was not supposed that the state would retain all lands given it for actual use by the beneficiaries; the trust lands were too extensive and too often inappropriate for the selected purposes. Lassen v. Arizona, 385 U.S. at 460, 87 S.Ct. at 585, 17 L.Ed.2d at 518. Congress plainly expected the trust lands to be managed to generate a fund, accumulated from the sale and use of the lands, with which the state could support the beneficiaries. Id. Thus, the primary duty of the

state as trustee[1] is to manage state trust land to maximize income from the trust lands.

The Arizona Legislature delegated the exercise of its fiduciary obligation to control and manage the state trust land to the Arizona State Land Department and its head, the State Land Commissioner. A.R.S. §§ 37-102 and 37-132. A.R.S. § 37-102(B) directly vests all control of state trust lands in the State Land Department:

> The department shall have charge and control of all lands owned by the state, and timber, stone, gravel and other products of such lands, except lands under the specific use and control of state institutions and the products of such lands.

A.R.S. § 37-132(A)(1) imposes this general responsibility for managing the land on the Commissioner. The statute also imposes specific management duties on the Commissioner.

> A. The commissioner shall:
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> . . . .
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> 3. Make long-range plans for the future use of state lands in cooperation with other state agencies, local planning authorities and political subdivisions.
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> 4. Promote the infill and orderly development of state lands in areas beneficial to the trust and prevent any urban sprawl or leapfrog development on state land.

A.R.S. § 37-132(3) and (4). Thus, the Commissioner has the statutory duty to determine the proper use for the state trust land.

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[1]/State and federal courts have construed trusts established by the enabling acts of various western states as true trusts. Berry v. Arizona State Land Department; Lassen v. Arizona; United States v. 111.2 Acres of Land, 293 F.Supp. 1042, 1049 (E.D. Wash. 1968), aff'd 435 F.2d 561 (9th Cir. 1970) (school land trust are real trusts, not illusory.)

Cities and towns derive their powers from art. XIII of the Arizona Constitution and Title 9 of the Arizona Revised Statutes. Counties derive their powers from A.R.S. §§ 11-101 to -961. No question exists that cities, towns and counties have the authority to zone and designate land uses for those lands within their boundaries.[2/] Accordingly, the Commissioner and the local jurisdictions both have certain power to dictate land use of those state trust lands located within city, town and county borders, subject to the limits of their respective authority.

A closer examination establishes the superiority of the Commissioner's authority over that of the local jurisdiction. It is a fundamental rule that municipal corporations have no inherent police power, that their powers must be delegated to them by the constitution or laws of the state, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968), and that they may not exercise powers that are inconsistent with the Arizona Constitution or the general state laws. State v. Jacobson, 121 Ariz. 65, 588 P.2d 358 (App. 1978); Shaffer v. Allt, 25 Ariz.App. 565, 545 P.2d 76 (1976); Gardenhire v. State, 26 Ariz. 14, 221 P. 228 (1923). In addition, the local jurisdictions' exercise of their powers cannot conflict with the Enabling Act. In Gladden Farms, Inc. v. State, 129 Ariz. 516, 633 P.2d 325 (1981), the court emphasized:

> The Enabling Act is one of the fundamental laws of the State of Arizona and is superior to the Constitution of the State of Arizona in that neither the Arizona Constitution nor laws enacted pursuant thereto may be in conflict. Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947).

129 Ariz. at 518, 633 P.2d at 327.

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[2/] Counties may exercise their planning and zoning authority on those lands within county boundaries outside the corporate limits of any municipality. A.R.S. §§ 11-801 and 11-802.

In essence, the local jurisdictions cannot hamper the Commissioner's exercise of his duties toward state trust lands within their boundaries. The ultimate responsibility for the use and disposition of state trust land is placed on the state by the Enabling Act. The legislature empowered the Commissioner to fulfill that responsibility subject only to the supervision of the legislature and the governor. It is inconsistent with this express direction from the Enabling Act and legislature to permit a local jurisdiction to exercise control over the Commissioner's obligation to direct the use of the state trust lands. A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. County of Skamania v. State, 102 Wash.2d 127, 685 P.2d 576 (1984). The proper and orderly management of trust lands located state-wide and of state-wide importance requires the Commissioner to be responsible to state officials rather than to the officials of each local jurisdiction.

The limited authority allowed a local jurisdiction over state trust land is well illustrated by the case law involving other federal enabling acts which, similar to Arizona's Enabling Act, grant trust lands. In Oklahoma Education Association v. Nigh, 642 P.2d 230 (Okla. 1982), the court found a statute unconstitutional which authorized the use of trust lands to subsidize farmers and ranchers because it interfered with "the duty of the State as Trustee to maximize the return to the trust estate." 642 P.2d at 236. In State v. University of Alaska, 624 P.2d 807 (Alaska 1981) the court refused to allow Alaska's State Department of Natural Resources to include trust lands in a state park as it would restrict their use in contravention of the Enabling Act:

> The use that can be made of park lands as compared to state lands in general is severely restricted. Trees may not be cut, minerals may not be removed, nor can the land be used for raising farm animals. The general principle is that park lands are to be managed in a way that will increase 'the value of the recreational experience.' It is apparent that this objective is incompatible with the objective of using university lands for the 'exclusive use and benefit' of the university. The implied intent of the grant was to maximize the economic return from the

> land for the benefit of the university. This intent cannot be accomplished if the use of the land is restricted to any significant degree.

624 P.2d at 813. See also Tally v. Carter, 318 So.2d 835 (Miss. 1975) (State Land Commissioner violated the state's enabling act when he classified land from "forest" to "other" land contrary to maximal revenue generation.) Based on the court's repeated refusal to uphold governmental actions which tend to diminish the value of trust land, a law or ordinance passed by a local jurisdiction which adversely restricts or impacts on the Commissioner's ability to generate maximum revenue from trust lands must be held to violate the Enabling Act.

This conclusion that the Commissioner has the ultimate authority to dictate land use is further reinforced by those statutes which directly address the issue of local jurisdictions zoning of state trust land. It is a well-accepted maxim that where two statutes deal with the same subject, the more specific controls. Pima County v. Heinfeld, 134 Ariz. 133, 654 P.2d 281 (1982). On the issue of local jurisdictions zoning state trust land, the legislature has specifically given the Commissioner the final word:

> The local zoning decision shall govern the use of the lands unless the commissioner determines that such zoning is detrimental to the interests of the trust. If the commissioner so determines, the commissioner shall prepare a written statement of the reasons for the determination and shall within ten days of such a decision provide a copy of the written statement to the local planning authority. The local government within whose jurisdiction the lands are located has thirty days from receipt of this statement to appeal the commissioner's decision to the board of appeals as provided for in § 37-215.

A.R.S. § 37-334(E). A.R.S. § 37-212(C) contains similar language:

> The commissioner may reclassify lands when he determines that reclassification is in

> the best interest of the trust and of the state. The intended use of the reclassified land shall be consistent with the development plan and zoning of the local governmental authority unless the commissioner determines that this will be detrimental to the interests of the trust. If the commissioner so determines, a written statement of the reasons for the determination shall be prepared and provided to the local governmental authority having jurisdiction for the area in which the lands are located. The local governmental authority shall have thirty days from the receipt of this statement to appeal the commissioner's decision to the board of appeals as provided in § 37-214. If no development plan or zoning has been adopted for the area in which the lands are located, the commissioner may reclassify the lands. Notice of such reclassification shall be provided to the local governmental authority.

Clearly, under A.R.S. §§ 37-334(E) and 37-212(C) the Commissioner makes the final determination as to the proper use of the state trust land unless the local jurisdiction successfully proves to the board of appeals or the superior court, under the Administrative Review Act, A.R.S. §§ 12-901 to -914, that the Commissioner acted arbitrarily and capriciously in finding the local jurisdiction's zoning detrimental to the trust. Short of such an adverse decision at the appellate level, the Commissioner has the duty and authority, undiminished by local jurisdictions, to determine the proper use for state trust lands.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

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